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Human Rights in South Africa

JOHN T. BAKER*

Introduction

This entire paper is based on the assumption that the oppression and suppression of 13,016,000 people by 3,106,000 people is an affront to the community of nations and is a violation of international law. The efforts in South Africa to maintain and reinforce the ascendancy of its white population over the non-white population of Africans, Indians and Coloureds is in conflict with what is nothing less than a major revolution in race relations in the modern world. The evil of the policy of separation of races lies in the presumption of racial superiority translated into the deliberate infliction of an inferior way of life on all who have non-white skins. Not permitted to choose their own way of life, the non-white population is reduced to permanent political, social, economic and cultural inferiority. We are beginning to recognize more fully that when men are compelled to live within a rigid class, confined within an exclusive creed, or subjected to discrimination of race and color, they are deprived of their human worth and dignity and are less valuable as citizens. Imposed discrimination restricts access to the law and education, to health and entertainment, to economic equality, and to dignity and progress. It crushes hope and breeds violence. Therefore, in spite of its contentions the racial policies of South Africa have lost their domestic character and become a major concern to the community of nations.

After sixteen years of *apartheid*¹ South Africa is further than ever from solving its race problems. A small but powerful white minority holds the black majority in its grip. The years of *apartheid* rule have turned a nonviolent situation into one of active violence.

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¹ Roskam, *Apartheid and Discrimination* (1960); at p. 98 Dr. Roskam points out that the term *apartheid* appeared for the first time in the *Afrikaan Dictionary* in 1950 where it was defined as:

"A political tendency or trend in South Africa, based on the general principles

- (a) of a differentiation corresponding to differences of race and/or level of civilization, as opposed to assimilation;
- (b) of the maintenance and perpetuation of the individuality (identity) of the different colour groups of which the population is composed, and of the separate development of these groups in accordance with their individual nature, traditions and capabilities as opposed to integration . . ."

The position taken in this paper is that the South African racial crisis cannot be resolved without international intervention. Oppenheim defines the term "intervention" under general international law as "dictatorial interference by a state in the affairs of another state for the purpose of maintaining or altering the actual condition of things."² For the purposes of this paper the above definition will be used whenever reference is made to intervention. The white society can rule, but it cannot create the conditions it regards as essential to its own security; the Africans, who are determined to establish a fully representative government, can challenge this rule, but they cannot break it. To do nothing, and hope that time will provide a solution, will lead only to unilateral intervention outside the framework of the United Nations, and thus to a race war, in which the casualties would consist of the South African white community, the non-revolutionary leaders of other African states, and ultimately perhaps the United Nations itself. The alternative — collective action through the United Nations — is perhaps the only way to avoid a holocaust.

Historical Background

Although the political doctrine of apartheid is relatively new, the theory of racial separation in South Africa has existed in one form or another from the beginning of the country's history. From the earliest beginning of European settlement in the Cape of Good Hope in 1652³ white supremacy has been the essential reality of the struggle for power in South Africa. Each government has rested its appeal upon it; each has reflected the existence of two exclusive but mutually dependent societies, divided from each other entirely by color, with power and privilege firmly in white hands. The notions of racial exclusivity and mutual dependence, combined with white political domination and economic privilege, convey the essential elements of South African politics through the centuries.

Politically, South Africa is a Republic. It broke away from the Commonwealth on May 31, 1960.⁴ The Republic is composed of four provinces — Cape, Natal, Transvaal and Orange Free

² Rajan, *United Nations and Domestic Jurisdiction*, 91 (1958).

³ Marguard, *The Peoples and Policies of South Africa*, 1 (1962).

⁴ *Id.* at 30.

State, with a total area of 472,359 square miles.⁵ Within its geographical boundaries is the protectorate of Basutoland, which is controlled by a Resident Commissioner under the direction of the High Commissioner for the United Kingdom, who also administers the contiguous territorial protectorates of Bachuanaland and Swaziland.⁶ Adjacent to the Republic of South Africa is the territory of South-West Africa over which the former was granted a "C" Mandate under Article 22 of the Covenant of the League of Nations, December 17, 1920.⁷

At the time of the last census, 1960, the total population of the Republic of South Africa was 16,122,000, and of this number the official racial classification was as follows: "Whites" 3,106,000; "Bantu" 11,007,000; "Coloured" 1,522,000; and "Asians" 487,000.⁸ Although the legal aspects thereof are discussed in greater detail later in this paper it seems suitable to give a brief explanation of the aforementioned racial classifications and the general terminology applied in South Africa with respect to the population.⁹ The term "White" applies to all whites as defined by South African law.¹⁰ Further the white group can be generally divided into "Afrikaners", which includes those whose first or mother-tongue is Afrikaans and who are primarily of Dutch descent (some also of Huguenot and German stock), and the English-speaking, primarily British, element. The "Bantu" classified by law to be "any person who is generally accepted as a member of any aboriginal race or tribe of Africa"¹¹ is also referred to as "African", "native", or "Kaffir" (derogatory). The "Coloureds" are those who are neither Africans nor Asians nor whites.¹² The "Asians" include Indians and other Asiatic groups. Also in current usage are the terms "blacks" and "non-whites". The latter is a convenient comprehensive reference to Africans, Coloureds and Indians.

The present Government of the Republic of South Africa is

⁵ Official Yearbook of the Union of South Africa, No. 29, 1956-57, U.G. 1957-58, p. 1.

⁶ Lord Hailey, *An African Survey*, (London, 1957) p. 272.

⁷ Starke, *An Introduction to International Law*, 108 (1963).

⁸ *South African Prospects and Progress*, compiled by the Information Service of South Africa in New York, 13 (1964).

⁹ See Roskam, *op. cit.*, pp. 158-165, for a detailed treatment of terminology.

¹⁰ Population Registration Act, Act No. 30 of 1950, § 8.

¹¹ Bantu Education Act, Act No. 15 of 1950, § 1 (v).

¹² Marguard, *op. cit.*, p. 75.

that of the Nationalist Party under the leadership of Dr. H. F. Verwoerd (previously Minister of Native Affairs), who took over the premiership from J. Strijdom in 1958. The Nationalist Party, which draws its support mainly from Afrikaner rural population, came into power in 1948 with a majority of the House of Assembly of the bicameral parliament. At that time Dr. D. F. Malan succeeded Field Marshal J. C. Smuts as Premier. Field Marshal Smuts had held that position since 1939 as head of the United Party. The Nationalist Party platform and the expressed policy of the Government is one of apartheid which, in brief, aims towards the separate development of the non-white ethnic groups. The Nationalist Government at this time is attempting to solve the race problem in South Africa by placing heavy emphasis on the concept of Bantustans.¹³

Under the Bantustan system, the majority of Africans (including most of those born and raised in urban areas) are to be consolidated into seven or eight autonomous tribally-based states grouped around a white-governed nucleus; those Africans needed for work in white-controlled areas are to vote in the Bantustan which most nearly reflects their ethnic origin.

The areas earmarked as present or prospective Bantustans comprise 13.7 percent of the republic. All are presently rural in character, dependent on a low level of subsistence agriculture and a considerable amount of imported food, and lacking in known resources. The government announced a modest \$160,000,000 five-year development plan for the reserves in January 1962, to be spent primarily on the construction of 33 towns and fencing, improvement in irrigation, and afforestation.¹⁴

It is both ironic and tragic that in this century, while many parts of the world are moving rapidly toward achieving the goal of according to every man individual worth and dignity, South Africa is at best maintaining the *status quo* in its race relations and at worst is moving toward a more rigidly defined race policy. Fifteen European nations have signed the European Convention on Human Rights¹⁵ which among other things allows individuals to bring suits against their own state. Many African states are reflecting their concern for human rights by including bills

¹³ For a detailed discussion of the Bantustans see, Legum, South Africa — Crisis For The West, 57-74 (1964).

¹⁴ "South Africa," Africa Report, Vol. 8, No. 10 November 1963, p. 41.

¹⁵ I Yearbook of the European Convention on Human Rights 96, 102 (1957)

of rights in their constitutions.¹⁶ The United States has recently passed a Civil Rights Act¹⁷ which gives every citizen free access to most public accommodations, eliminates job discrimination, and assures the right to vote to every citizen regardless of race creed or national origin.

South Africa was one of the original members of the United Nations and obligated itself, along with other members, to observe and respect the aims and purposes of the United Nations, one of the principal duties of the United Nations is to promote and encourage universal respect for, and observance of, human rights and fundamental freedoms. The great importance members attach to the realization of human rights is underlined by the fact that in 1948 the United Nations General Assembly adopted the Universal Declaration of Human Rights.¹⁸ Referring to the Declaration, Mrs. Eleanor Roosevelt, United States Representative on the Human Rights Commission of ECOSOC pointed out that it "was not treaty or international agreement and did not impose legal obligations; it was rather a statement of principles of inalienable human rights, setting up a common standard of achievement for all peoples and all nations."¹⁹ Perhaps the best way to poignantly illustrate the utter disregard which South Africa has for human rights is to contrast South Africa's racial policies with some of the aims of the United Nations as reflected in the Universal Declaration of Human Rights. Of course it is perfectly obvious that South Africa is not the only member nation of the United Nations which is failing to realize the goals set forth in the Declaration. However, it can probably be safely said that of all the member nations South Africa is furthest from achieving the aims espoused in the Declaration.

The following discussion will reveal an increasing application of a systematic policy of racial separation to all spheres of life in the Republic of South Africa. In pursuit of this objective the Government has established a rigid and all-embracing network of legislation which denies to a vast majority of the

¹⁶ See del Russo, *The European Bill of Rights*, 4 *Santa Clara Lawyer* 8, 27-28 (1963).

¹⁷ Civil Rights Act of 1964, 78 Stat. 241.

¹⁸ U.N. Doc. No. A/810, Gen. Ass. Off. Rec., 3d Sess. (1), Resolutions at 71 (1948). On the Declaration, see Lauterpacht, *The Universal Declaration of Human Rights*, 1948 *Brit. Y. B. Intl. L.* 354; Kunz, *The United Nations Declaration of Human Rights*, 43 *A. J. Intl. L.* 316 (1949); Humphrey, *The Universal Declaration of Human Rights*, 4 *Intl. J. (Canada)* 351 (1949).

¹⁹ 19 Dept. of State Bull. 751 (1948).

population those opportunities without which the legitimate aspirations and dignity of a human being cannot be realized.

Article 1 of the Universal Declaration of Human Rights states:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."

From the establishment of the Union of South Africa in 1910 many definitions of various racial groups were incorporated in a number of laws which did not always correspond with one another.²⁰ Prior to 1950 many people "passed" from one group into another if their physical features allowed this. Sometimes "passing" permitted people to elevate their personal as well as economic positions. However, the passage of the Population Registration Act of 1950²¹ for the first time contained a racial classification of the South African populations. This set was intended to provide the foundation for the strict implementation of the policy of apartheid. The Act actually introduced a rigid and inflexible system of racial classification with the underlying purpose of determining the racial group of every individual once and for all.²²

The Population Registration Act of 1950 provided for the compilation by the Director of the Census, on forms submitted to him under the Census Act of 1910, of a list to include the name of every person permanently and temporarily in the Republic. The Act provides that the population is to be classified as white, colored or native, and gives the following definitions:

(a) a "white" person means a person who in appearance is, or who is generally accepted as, a white person, but does not include a person who, although in appearance obviously a white person, is generally accepted as a colored person;

(b) "native" a person who in fact is, or is generally accepted as, a member of any aboriginal race or tribe of Africa;

(c) a "colored" person means a person who is not a "white" person or a "native".

There are of course multifarious problems which arise as a

²⁰ The Native Labour Regulation Act, Act No. 15 of 1911; Native (Urban Areas) Act, Act No. 25 of 1923; Representation of Natives Act, Act No. 12 of 1936; Native Trust and Land Act, Act No. 18 of 1936.

²¹ Population Registration Act, Act No. 15 of 1950.

²² See Carter, *The Politics of Inequality, South Africa Since 1948*, 81-84 (1958)

result of such a racial classification. There are many South Africans whose appearance does not furnish conclusive evidence as to whether they are white or not. Their classification depends therefore very much on the question of general acceptance. "Some whites have found themselves down-graded because they have been classified as colored due to their friendly relations with non-whites and their general behavior, which leads to the acceptance that they actually belonged to another group than to that which they claimed."²³

The decision with respect to all racial classification is taken by the Director of Census on the basis of information in his possession as supplemented, where necessary, by additional information obtained by officials of the Department of the Interior. However, this decision is not final and at any time after a person has been classified in the population registration this classification can be altered by the Director of Census.²⁴ He is not compelled to state what led him to his previous decision.²⁵ The fact that he is not obligated to disclose his sources of information opens the door to "informers" whose motives in denouncing people who are already classified may be to eliminate more successful business rivals, or just plain malice. The Act, however, does contain safeguards against malicious informing.²⁶ Objections raised against someone's classification must be lodged with a Board of not less than three persons constituted for that purpose by the minister and presided over by a person who is or has been a judge of the SICT. of South Africa or a magistrate.²⁷

Any person who considers himself aggrieved by his classification may object by submitting, in writing, an affidavit setting out the grounds upon which objection is made within thirty days after the classification is known to the person.²⁸ If the aforementioned Board rules against the person he may appeal the decision by application or notice or motion to the provincial or local division of the Supreme Court, the judgment of which is subject to appeal to the Appellate Division of the Supreme Court.²⁹

²³ *Id.* at 106.

²⁴ Population Registration Act, Act No. 15 of 1950, § 5 (3).

²⁵ *Ibid.*

²⁶ *Id.* at § 11 (b).

²⁷ *Id.* at § 11 (3).

²⁸ *Id.* at § 11.

²⁹ *Id.* at § 11 (7-9).

When a person reaches the age of 16 he is given an identity card which contains his classification, which, according to the Act, must be produced on demand by a peace officer.³⁰ The penalty for failing to comply with the Act is a fine of \$100 or 'six months' imprisonment or both.³¹

This particular Act has forced many people to change their mode of living and associates because they were classified differently than they had hitherto regarded themselves.

Some of the effects on a person claiming to be white and passing as white but classified as colored are: the person will be liable to have his name removed from the general voters' roll and put on a special colored voter's roll, he will be required to vacate his house in a European area and to live in a colored area, and he will have to move his children from a European school and put them among children with whom they have in the past been prevented from associating and whom they have been taught to consider as inferior. A person claiming to be and passing as colored but classified as native will be liable to be ordered to live in a location or native village, to carry a pass or similar document, to lose all rights of domicile in the town where he lives, and to be held up by any police constable for production of pass or tax receipt.

It seems unlikely that one could find anything any more irreconcilable than Article 1 of the Universal Declaration of Human Rights and the population Registration Act. The fact that one's whole life-pattern can be changed by a classification under this Act is intolerable, but when this classification can be made by one person the situation becomes unbearably cruel and inhuman.

Article 2 of the Universal Declaration of Human Rights states:

"(1) Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Political Rights

As to the right to vote in South Africa, a limited franchise

³⁰ *Id.* at § 13.

³¹ *Id.* at § 18.

was granted in the Cape Colony in 1852 and amended in 1892 to cover all male persons regardless of race who possessed property to the value of \$75 or who had earned during twelve months not less than \$50 and who could write down their name, address and occupation.³²

In 1909 the South Africa Act was passed which stipulated that members of both Houses of Parliament—Assembly and Senate — must be “of European descent.”³³ This provision prevented any non-white South African from standing for election to the Supreme Legislative bodies of the Republic.

In 1936 the Representation of Natives Act was passed, having as its principal effect the removal of African voters in the Cape Province from the common roll and granting them the franchise on a separate community roll. The Act provides that only in the Senate do all the Africans of the Republic have the right to be represented.³⁴ They are to be represented by eight European members, four appointed by the Governor-General, and four elected.³⁵

The latest legislation in this area, the Promotion of Bantu Self-Government Act, no. 46 of 1959, brought the requirements of apartheid in the matter of political rights to their logical conclusion. In an effort to achieve a total separation of white and non-white communities and to secure permanent political supremacy of the whites, this Act abolished all representation of Africans in Parliament after the expiration of their term in June 1960.³⁶

Subversion

Any nation has a right, and even an obligation, to protect itself from subversion. However, many of South Africa's subversion laws are of a questionable nature. The African Riotous Act of 1946 says that any activity which is “calculated to engender feelings of hostility between the European inhabitants on the one hand and any other section of the inhabitants of the Union on the other hand is subversion.”³⁷ With the intensifica-

³² Brookes and Macaulay, *Civil Liberties in South Africa*, 139 (1958).

³³ South Africa Act, Act No. 12 of 1909, §§ 26 (d) and 44 (6).

³⁴ Representation of Natives Act, Act No. 12 of 1936, § 12.

³⁵ *Id.* at § 8.

³⁶ Promotion of Bantu Self-Government Act, Act No. 46 of 1959, § 15.

³⁷ Riotous Assemblies Act, Act No. 27 of 1946 §§ 2 and 3.

tion of the Government's effort to make apartheid work this Act has been used more frequently to the detriment of non-whites as opposed to whites. The Act is clearly designed to prevent any agitation against apartheid, and provides for banishment from any area of any person guilty of fomenting hostility between Europeans and other races.³⁸

Another Act which, while purportedly non-discriminatory, is directed at the opponents of apartheid is the Suppression of Communism Act, No. 44 of 1950 as amended in 1951. The following definition of "Communism" appears in the Act:

"'Communism' means the doctrine of Marxian Socialism as expounded by Lenin and Trotsky, the Third Communist International, the Comintern or the Communist Information Bureau, the Cominform or any related form of that doctrine expounded or advocated in the Union for the promotion of the fundamental principles of that doctrine and includes, in particular, any doctrine or scheme — (a) which aims at the establishment of a despotic system of government based on the dictatorship of the proletariat under which one political organization only is recognized and all other political organizations are suppressed or eliminated; or (b) which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by threats of such acts or omissions or by means which include the promotion, of disturbances or disorder, or such acts or omissions or threats; or (c) which aims at bringing about any political, industrial, social or economic change within the Union in accordance with the directions or under the guidance of or in cooperation with any foreign government or any foreign or international institution whose purpose or one of whose purposes (professed or otherwise) is to promote the establishment within the Union of any political, industrial, social or economic system identical with or similar to any system in operation in any country which has adopted a system of government such as is described in paragraph (a); or (b) which aims at the encouragement of feelings of hostility between the European and non-European races of the Union the consequences of which are calculated to further the achievement of any object referred to in paragraph (a) or (b)."³⁹

As to the above definition Gerald Gardiner observes, quite cogently, "It is not inappropriate to comment that if the Govern-

³⁸ *Id.* at § 3 (5). A person convicted of an offense under the provisions of §§ 2 and 3 who was born outside the Republic, may be removed from the Republic under § 5 of this Act.

³⁹ Suppression of Communism Act, Act No. 44 of 1950, § 1 (1).

ment passes a law which discriminates against non-Europeans, and therefore causes a feeling of hostility between Europeans and non-Europeans, that is not 'Communism', but if anybody protests against that law in a manner which causes disorder, that is 'Communism'.⁴⁰

One of the ramifications of this loosely worded statute can be seen in the proceedings of the South African Treason Trial which started by a mass arrest of 140 persons on December 5, 1956 and resulted in prolonged detention of the accused, the last of the detainees being released on August 31, 1960.⁴¹

Article 7 of the Universal Declaration of Human Rights states:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

There are evidences in every part of South Africa of separate, but not necessarily equal facilities. There are separate entrances to post offices, railway stations, separate carriages on trains, separate buses, separate benches in the parks, separate benches and even separate parts of the law courts (the witness box from which all take the same oath is partitioned off).⁴²

One author traces the evolution of separate, but not necessarily equal, facilities and amenities to a legislative reaction to judicial decisions.⁴³ The first in a line of decisions came in the Cape in 1943 dealing with Cape bathing beaches. The Cape Provincial Division of the Supreme Court held that the courts could annul a municipal by-law if the difference in the facilities provided for white and colored peoples reflected an inequality of treatment which was in all circumstances "manifestly unjust or oppressive."⁴⁴ An extension of the principle was made in 1950 by the Appellate Division which ruled that a regulation reserving a portion of all trains to whites, but not restricting them to those sections, led to partiality and inequality in treatment. Mr.

⁴⁰ Gardiner, "The Treason Trial in South Africa", *Journal of the International Commission of Jurists*, No. 1, p. 49.

⁴¹ For a more detailed discussion of the Treason Trial see, Gardiner, *op. cit.* at note 40.

⁴² Marguard, *op. cit.*, pp. 155-177.

⁴³ Brookes and Macaulay, *op. cit. supra* note 32.

⁴⁴ R. V. Carelse, 2 S.A. 242 (Cape P.D. 1943).

Justice Centlivres, then Chief Justice and now Chancellor of Capetown University, said, "The State has provided a railway service for all citizens irrespective of race and it is unlikely that the Legislature intended that users of the railways should, according to their race, have partial or unequal treatment meted out to them."⁴⁵ While that case was actually being considered, the Government acted without waiting to see whether a challenge to their policy of racial separation was to become a reality. The Railways and Harbours Amendment Act, 1949, enabled the administration to reserve railway premises and trains for the exclusive use of particular races provided that equal facilities were available for all races.⁴⁶

The Reservation of Separate Amenities Act of 1953 legalized the provision of separate, and not necessarily equal, facilities for the different races in South Africa⁴⁷ and made it impossible for the courts to adjudicate upon the validity of any regulation in terms of any inequality it involved.⁴⁸ The Factories Machinery and Building Work Amendment Act of 1959 continued this trend by requiring that separate amenities had to be provided in factories for all four races.⁴⁹ Also in 1959 the Separate Amenities Amendment Act enforced segregation for bathing in the sea up to the limit of territorial waters.⁵⁰

Discrimination based on race is also prevalent in the area of liquor laws. It has always been an offense in South Africa to supply any alcoholic drink to Africans.⁵¹ Africans are supplied with Kaffie beer which is distributed under the control of local authorities through a system of licensing or under a municipal monopoly.⁵² The prohibition of home brewing has led to a large-scale illicit trade in the large towns carried on by "shebeen queens" which are the African equivalents of "boot-leggers."

Article 9 of the Universal Declaration of Human Rights states:

"No one shall be subjected to arbitrary arrest, detention or exile.

⁴⁵ R. V. Abdurahaman, 3 S.A. 136, 139 (A.D. 1950).

⁴⁶ Railway and Harbours Amendment Act, Act No. 22 of 1949, § 4.

⁴⁷ Reservation of Separate Amenities Act, Act No. 18 of 1953, § 2 (1).

⁴⁸ *Id.* at § 3.

⁴⁹ Factories, Machinery and Building Work Amendment Act, Act No. 42 of 1960, § 21.

⁵⁰ Reservation of Separate Amenities Amendment Act of 1959, § 1.

⁵¹ Liquor Act, Act No. 30 of 1928.

⁵² *Id.* at § 31-87.

Article 10 of the Universal Declaration of Human Rights states:

"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him".

Article 11 of the Universal Declaration of Human Rights states:

"Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The Native Laws Amendment Act of 1952 authorizes the arrest "without warrant" of Africans suspected of being idle or undesirable.⁵³ The African is then brought before a Native Commissioner or Magistrate.⁵⁴ If the Magistrate determines that the African is idle or undesirable he may order the African to be removed from the urban area and sent to his home or to a place indicated by the Commissioner or Magistrate, or he may order that the African be sent to a work colony.⁵⁵

The South African Government began to use these laws which provided for arbitrary arrest and detention of Africans and in 1954 a General Circular was issued by the Secretary of Native Affairs.⁵⁶ Under the General Circular it was provided that Africans who were arrested for specific technical offenses should not be charged immediately by the police but should be handed over to the local Employment Officer of the Native Affairs Department. The Employment Officer then "offered" the Africans "employment" in non-prescribed rural areas.⁵⁷

Article 13 of the Universal Declaration of Human Rights states:

"(1) Everyone has the right to freedom of movement and residence within the borders of each state.

"(2) Everyone has the right to leave any country, including his own, and to return to his country."

⁵³ Native Laws Amendment Act, Act No. 54 of 1952, § 36.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ General Circular No. 23, Scheme For The Employment of Petty Offenders in Non-Prescribed Areas, issued by the Department of Native Affairs, South Africa (1954).

⁵⁷ *Id.* at para b.

Prior to the establishment of the Republic and even before the Union came into being each province had laws applicable to non-whites generally,⁵⁸ and Africans⁵⁹ and Asians⁶⁰ in particular, mainly to control vagrancy and the flow of labor into specific urban areas. The laws which applied specifically to African movement within the country were broadly termed "Pass Laws".⁶¹ At one time prior to 1952 it had been estimated that the African was required to carry as many as 27 different identifying documents in connection with work, travel and residence.⁶² A consolidation of most of the pass laws was brought about by the Natives' (Abolition of Passes and Coordination of Documents) Act of 1952. The Act eliminated many of the passes and replaced them by a single "reference book" containing the African's employment contract, tax receipt and other references of which proof was formerly required in the form of a separate pass.⁶³ This reference book must be carried on the person of the African, must be produced upon demand and failure to do so is a criminal offense.⁶⁴ The effect of this new system has been to introduce a new form of pass and to subject a greater percentage of the African population to the powers of summary arrest, and abuses thereunder. Available statistics indicate that in 1953 a total of 110,427 Africans were sentenced for "offences against curfew regulations or regulation on production of documents"

⁵⁸ Law to provide against Stock Theft, Vagrancy and the Coloured Squatters, Chapter 133 of the Codified Laws of the Orange Free State and Laws No. 18 of 1893 and No. 8 of 1899 of the same state; Volksraad resolution [South African Republic (Transvaal)] of August 26, 1896.

⁵⁹ Acts No. 22 of 1867 and No. 30 of 1895 of the Cape Colony; Ordinance No. 2 of 1885 of Natal; Law No. 6 of 1880, the Volksraad resolutions of June 10, 1891 and September 6, 1893 and Laws No. 6 of 1880, No. 24 of 1895, No. 15 of 1898, No. 23 of 1899, for the South African Republic (Transvaal).

⁶⁰ Act No. 37 of 1904, of the Cape Colony (Chinese Exclusion Act), Chapter 23 of the Codified Laws (1892) of the Orange Free State (Law to provide against the influx of Asiatics); resolution adopted by the Volksraad of the Transvaal on May 9, 1888.

⁶¹ See South African Institute of Race Relations, Fourth Annual Report, 1933. Also see Kahn, Pass Laws and the Report of the Ad Hoc Committee on Forced Labour (Official Records: Sixteenth Session of the Economic and Social Council, Supplement No. 13), U. N. Doc. E/24.31, pp. 600-601 and 604-613.

⁶² Report of the United Nations Commission on the Racial Situation in the Union of South Africa, Gen. Ass. Off. Rec., Eighth Session, Supplement No. 16, U.N. Doc A/2505 and A/2505 Add. 1, 1953, pp. 66.

⁶³ Natives (Abolition of Passes and Coordination of Documents) Act, Act No. 67 of 1952, § 2 and 3.

⁶⁴ *Id.* at § 13 and 15.

and 43,951 for "offences against the pass laws."⁶⁵ The reaction of more militant Africans to the pass laws can be seen in the Sharpeville shootings.

On March 21, 1960, in Sharpeville and two other townships near Johannesburg and Capetown, Republic of South Africa, what began as a peaceful demonstration against discriminatory racial policies ended with 72 persons dead and many more wounded as a result of police gunfire.⁶⁶ The demonstration had been organized by the Pan Africanist Congress (PAC), a more militant offshoot of the larger and older African National Congress (ANC), to protest the government's indication that it would tighten enforcement of the laws requiring Africans to carry the fifty-page "pass" that controls so much of their lives. In Sharpeville alone, at least 20,000 Africans marched to the local police station. A panicky police force fired from behind wire fences into the crowd.

Although drastic law-enforcement measures, including arrests of PAC's founder, Robert Sobukwe, and most of its other leaders, prevented further major bloodshed, the tension did not ease. Troops and "civilian force" regiments were called up. By the end of March, the toll from police action in South African urban centers had risen to at least 90. A "strike" of African workers, who make up over 75 per cent of the work force, cost the economy some \$6,000,000 before hunger and police measures brought an end to work stoppages.

Further encroachment upon the right to movement of the African is to be found under the Native (Urban Areas) Consolidated Act of 1945, as amended.⁶⁷ This Act gives wide powers to magistrates to regulate the movement and employment of Africans in or about the urban areas.⁶⁸ Specifically under this Act an African must obtain permission to be in a proclaimed area and such permission can be refused

- (1) if there is a surplus of Native labour in said area,⁶⁹

⁶⁵ A Survey of Race Relations in South Africa, compiled by Horrell, South African Institute of Race Relations, 1954, p. 150.

⁶⁶ A week after the incident, the Republic government maintained that the first shots had been fired by Africans. See U. N. Doc. S/PV 851, March 30, 1960.

⁶⁷ Native (Urban Areas) Consolidation Act, Act No. 25 of 1945, as amended by Acts No. 42 of 1946, No. 45 of 1947, Nos. 54 and 67 of 1952 and No. 16 of 1955.

⁶⁸ *Id.* at § 23.

⁶⁹ *Id.* at § 23 (1).

(2) if the African cannot prove that he has complied with all pass regulations, or⁷⁰

(3) if by his documents it is indicated that the African is domiciled outside the area and has not obtained a release from his previous employer.⁷¹

Also under the Natives Laws Amendment Act of 1952 no African may remain for more than 72 hours in an urban or proclaimed area unless:

(a) He was born and permanently resides in such area; or⁷²

(b) He has worked continuously in such area for one employer for a period of not less than ten years or has lawfully remained continuously in such area for a period of not less than fifteen years and has not during either period been convicted of any offence in respect of which he has been sentenced to imprisonment without the option of a fine for a period of more than seven days or with the option of a fine for a period of more than one month; or⁷³

(c) Such Native is the wife, unmarried daughter or son under the age at which he would become liable for payment of general tax under the Natives Taxation and Development Act, 1925 (Act No. 41 of 1925) of any Native mentioned in paragraph (a) or (b) of this subsection, and ordinarily resides with that Native; or⁷⁴

(d) Permission so to remain has been granted to him by a person designated for the purpose by that urban local authority.⁷⁵

Residence and its corollary, the right to own property,⁷⁶ have been subjected to a long and carefully developed policy of apartheid in South Africa. As early as 1913 the purchase, lease or acquisition of land by an African outside "scheduled Native areas" was declared to be a criminal offense.⁷⁷ Under the Natives (Urban Areas) Act of 1923 the Africans ministering to the needs of white men in urban areas were concentrated in segregated living quarters in villages and locations outside white residential areas or in hostels for single men and women, with the exception

⁷⁰ *Id.* at § 23 (2).

⁷¹ *Id.* at § 23 (3).

⁷² Native Laws Amendment Act, Act No. 54 of 1952, § 27.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ United Nations Declaration of Human Rights, Article 17 (1) states: "Everyone has the right to own property alone as well as in association with others."

⁷⁷ Natives Land Act, Act No. 27 of 1913, §§ 1 and 5.

of those employed as domestic help in white communities.⁷⁸ The Native Trust and Land Act of 1936 provided for further separation of African and European land holding by increasing the limitations imposed upon the purchase of land by Africans to areas reserved for them or released for their occupation.⁷⁹ This Act was designed to provide a final settlement of land between the Europeans and Africans entitling the latter to acquire land only in the above-mentioned areas, which totalled approximately 10% of the entire country.⁸⁰ This Act also added restrictions upon residence of Africans outside reserves and released areas as well as within the released areas. Finally the effect of the Act was to deprive the Natives of Cape Province of their previous right to purchase land outside scheduled Native areas.⁸¹ Also the Natives (Urban Areas) Consolidation Act of 1945, as amended, not only imposed restrictions upon movement and employment, but also prevented Africans from acquiring any right to land within an urban area from any person other than a fellow African.⁸²

Perhaps the most egregious of all the acts relating to residence is the Group Areas Act of 1950 which represents the final blow to any form of African land ownership and establishes the pattern for the development of the African reserves (Bantustan states). The Act is designed to effect complete segregation of different racial groups into areas assigned to each. The Act provides that by proclamation of the Governor-General-in-Council of each province the exclusive rights to own property, reside or carry on a business are to be allocated and restricted to certain racial areas.⁸³ The Act, which is also applicable to Coloreds and Indians,⁸⁴ provides for "controlled", "separate" and "group areas"⁸⁵ as determined by proclamation. As soon as a proclamation has been issued the area concerned becomes a controlled area wherein the acquisition of immovable property is prohibited to any person of a different race than the owner of said

⁷⁸ Natives (Urban Areas) Act, Act No. 25 of 1923, § 1.

⁷⁹ Native Trust and Land Act, Act No. 18 of 1936, § 11, 12.

⁸⁰ Second Report of the United Nations Commission on the Racial Situation in the Union of South Africa, Gen. Ass. Off. Rec., Ninth Sess., Supp. 16, Doc. A/2719, 1954, p. 12.

⁸¹ *Supra* Note 62 at 73.

⁸² *Supra* Note 78 at 56.

⁸³ Group Areas Act, Act No. 41 of 1950, § 3.

⁸⁴ *Id.* at §§ 1 and 2.

⁸⁵ *Id.* at §§ 1 (v) and 3.

property.⁸⁶ Immovable property includes real rights therein and any lease or sublease thereof.⁸⁷ No person may enter into an agreement providing for the acquisition of immovable property within a controlled area by a "disqualified person" (a person belonging to a different racial group).⁸⁸

A much later act, the Promotion of Bantu Self-Government Act of 1959 aims at the preservation of separate white and African communities. The Secretary for Bantu Administration has written that the "maintenance of white political supremacy over the whole country as a whole is a *sine qua non* for racial peace and economic prosperity in South Africa."⁸⁹ This view is supported by the statement of the Prime Minister that the whites seek domination over their part of the country at the price of allowing the Bantu to "develop" their own area.⁹⁰ This area has been estimated at being about 13% of the land area of the entire country.⁹¹ Further, it has been calculated that even if properly planned the area could only support about 30% of its total population.⁹² Added to this is the apparent lack of industrial employment opportunities in view of which the immediate prospects of developing the reserves do not seem very bright.⁹³

In sum then, the African's right to residence is limited to certain prescribed areas and his right to ownership of immovable property can be said to have been lost completely in the urban area. Furthermore in the rural areas the African's residence must be considered in the light of European agricultural, labor requirements and the Government's policy with respect to the reserves. All Africans are seen as having their "home" in the reserves from which they are allowed to go out to industrial and agricultural areas only when, and for as long as, their presence may be required by the Europeans. The basic aims of the Government are clearly expressed in the White Paper related

⁸⁶ *Id.* at § 4.

⁸⁷ *Id.* at §1 (xi).

⁸⁸ *Id.* at §8.

⁸⁹ Cornell, "The Statutory Background of Apartheid," 16 *The World Today*, No. 5, p. 185. (1960)

⁹⁰ "A Survey of Race Relations in South Africa, 1958-1959," South African Institute of Race Relations, 1958, p. 51.

⁹¹ "South Africa," *Africa Report*, Vol. 8, No. 10, November 1963, p. 41.

⁹² "The Economic Development of the Reserves," A Fact Paper, South African Institute of Race Relations, No. 3, 1959, p. 12.

⁹³ *Id.* at pp. 14-26.

to the Promotion of the Bantu Self Government Act of 1959, which explained that the purpose of allocating reserves has been and remains to identify each of the African communities with its own land and ensure that the Africans enter the white area as migrant laborers only.⁹⁴

Article 23 of the Universal Declaration states:

"(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

"(2) Everyone, without any discrimination, has the right to equal pay for equal work."

The rigid distinction between the races which characterizes the labor system of South Africa reveals the true basis of the present policy of apartheid as applied to all spheres of African life. "The type and grade of work done by individuals, and hence the wages earned, are determined by their racial group as much as by their individual aptitudes and preferences. On the one hand, opportunities for employment are different for members of different racial groups. On the other hand, the quality of work performed is affected by the unequal opportunities open to the different groups in respect of unemployment, wages and living conditions in general."⁹⁵

A century ago the mining and manufacturing industry was almost non-existent and major labor legislation was passed only when the labor market had already developed. Towards the end of the nineteenth century the mining industry became more and more important and called for new labor legislation concerning specifically two problems: first, a solution had to be found to satisfy the suddenly accelerated demand for skilled and unskilled workers and, secondly, a system had to be established by which immigrating European workers on the one hand, and the large number of rural Africans newly recruited to industry, the imported Indian, Chinese and other colored workers on the other, could be kept under control. For this general purpose various laws were enacted such as the Mines and Works Act of 1911, the Labour Regulation Act of 1911, the Workmen's Wages Protection Act of 1914, the Native Urban Areas Act of 1923.⁹⁶

⁹⁴ Supra Note 90 at 48.

⁹⁵ Hellman, *Handbook on Race Relations in South Africa*, 109 (1949).

⁹⁶ For a more detailed discussion of these Acts see, Brookes and Macaulay, *Civil Liberties in South Africa*, pp. 89-108 (1958).

All of this legislation as well as its practical implementation is based upon separation of the races: professional, supervisory and skilled work is performed mainly by Europeans, to a lesser extent by Coloureds and Asiatics, while there are almost no Africans in this category. This is true for all branches of economic activity: agriculture, mining, manufacturing, transport, public administration and professional work; exceptions are made only in the fields of teaching, religion, law, and medicine where the non-Europeans may serve members of their racial community.⁹⁷ The restrictions upon Africans taking on skilled jobs in competition with whites can be traced back to the early days of industrialism and was developed mainly in connection with the hiring of labor and conditions of work in the mining industry. Thus the Native Labour Regulation Act and the Mines and Works Act, both of 1911, provided not only for the supervision, control and recruitment of white labor, but also for a graded system of wages and the establishment of native labour bureaus in mines and works.⁹⁸ In 1949, the Minister of Labour was empowered by the Native Law Amendment Act to extend the Native Labour Regulation Act to other industries.⁹⁹ While under the Mines and Works Act it was possible to prohibit the employment of Africans as skilled workers in the mines,¹⁰⁰ the Native Law Amendment Act of 1949 provides more specifically that certificates of competency in any occupation in, at or about mines, works and machinery may be granted only to Europeans, Cape Coloureds, Cape Malays and people known as Mauritius Creoles or St. Helena persons.¹⁰¹ The Act thus debar African mine workers from doing much of the better-paid work regardless of whatever skill they may have acquired. "It constitutes the legal colour bar to the employment of African labor in the types of work specified."¹⁰²

It seems fair to say, in summary, that the entire economy of the Republic of South Africa would seem to operate under an elaborate system of apartheid which deprives the African worker of the opportunity of obtaining higher-paid jobs, virtually eliminates his free choice of work and prevents his equal

⁹⁷ Hellman, *op. cit.* supra note 95.

⁹⁸ Native Labour Regulation Act, Act No. 15 of 1911, § 25 (1) (O).

⁹⁹ Native Law Amendment Act, Act No. 54 of 1949, §1.

¹⁰⁰ Mines and Works Act, Act No. 17 of 1911, §4 (1) (N).

¹⁰¹ Supra Note 99 at § 12 (2) (a).

¹⁰² Hellman, *op. cit.* supra note 95 at 147.

representation in industrial councils and trade unions.

This of course does not by any means exhaust the laws which relegate 2 major portions of South Africa's population to a permanently unequal status and which are enacted without the slightest regard for the human rights of these citizens. No less disturbing than the laws discussed are the negation of social rights, of free choice of marriage¹⁰³ or religious worship, and of a carefully supervised educational system¹⁰⁴ whereby non-whites are to receive instruction solely in preparation for their acceptance of an inferior social, economic and political status.

South Africa and the United Nations

In addition to flagrant violations of the Universal Declaration of Human Rights, which South Africa would argue, and has argued, has no binding legal effect, South Africa's racial policies are in conflict with at least five provisions of the Charter of the United Nations. The Preamble of the Charter states that the United Nations is determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women. . . ." One of the purposes of the United Nations is to achieve international cooperation "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Under Article 55(c), the United Nations shall promote "universal respect for, and observance of, human rights, and fundamental freedoms for all without distinction . . .", and Article 56 obligates members "to take joint and separate action in co-operation with the organization for the achievement of the purposes set forth in Article 55." Finally, one of the ob-

¹⁰³ The Mixed Marriage Act, Act No. 52 of 1949 makes illegal any intermarriage between whites and non-whites. The United Nations Universal Declaration of Human Rights, Article 16 (1) states: "Men and women of full age, without any limitation due to race, nationality, or religion, have the right to marry and found a family. They are entitled to equal rights as to marriage, during marriage and at its conclusion."

¹⁰⁴ The Bantu Education Act, Act No. 6 of 1953, places all responsibility for African education in the hands of the Minister of Native Affairs who, in his discretion, can establish schools for African children. He can also close down schools for Africans, if he believes that this is in the interest of the African people. The United Nations Universal Declaration of Human Rights, Article 26 states: "Everyone has the right to education. Education shall be free at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."

jectives of the United Nations trusteeship system shall be "to encourage respect for human rights and for fundamental freedom for all without distinction. . . ." ¹⁰⁵

There are three major areas in which South African policy has been the subject of concern and discussion in the United Nations — South West Africa, the treatment of Indians in South Africa, and South Africa's racial policy of apartheid.

South Africa has been in conflict with the United Nations ever since 1946 on the issue of its mandate over South West Africa. Under the League of Nations, South West Africa was made a C mandate to be administered by the South African Government.¹⁰⁶ The League mandates system was dissolved in 1946 after the Charter of the United Nations came into being, and it was expected that all territories subject to mandate would be voluntarily placed under the U.N. trusteeship system. However, South Africa did not place South West Africa under the trusteeship system and denied then, and has continued to do so, that it was under any legal obligation to do so. Although three opinions of the International Court of Justice¹⁰⁷ have confirmed the international status of the territory, the United Nations has been unable to agree how to establish its legal rights there. South Africa has refused to respect the Court's opinions or to comply with the resolutions of the General Assembly. The compulsory jurisdiction of the International Court of Justice was invoked in 1960 by Ethiopia and Liberia, both former members of the League of Nations. They have asked the Court to declare that South Africa's apartheid practices in South West Africa were a violation of its obligations under Article 2 of the Mandate and under Article 22 of the League's Covenant; and to declare that South Africa must cease apartheid practices immediately.

The treatment of Indians in South Africa has also been before the United Nations General Assembly since 1946. The Government of India brought up this question before the United Nations by a letter dated June 22, 1946.¹⁰⁸ The Indian complaint

¹⁰⁵ U. N. Charter art. 76, para c.

¹⁰⁶ Carter, *Politics of Inequality, South Africa Since 1948*, 382 (1958).

¹⁰⁷ *International Status of South West Africa*, Advisory Opinion, I.C.J. Reports 1950, p. 143; *South West Africa, Voting Procedure*, Advisory Opinion, I.C.J. Reports 1955, p. 78; *Admissibility of Hearings of Petitions by the Committee on South-West Africa*, Advisory Opinion, I.C.J. Reports 1956, p. 23.

¹⁰⁸ Rajan, *United Nations and Domestic Jurisdiction* (London, 1958), p. 306.

was that a quarter of a million people of Indian origin in South Africa, mostly descendants of laborers and traders who went there between 1869 and 1911 at the request of the then Government of Natal (now a province of the Republic of South Africa) and under an arrangement between the Indian and South African Governments, had been subjected progressively to discriminatory measures and deprived of elementary civic and political rights, contrary to the conditions of the arrangement between the two Governments. "The Government of India being a party to arrangements which resulted in Indian emigration to South Africa, has felt continuing responsibility and has from time to time intervened on behalf of Indians with the South African Government. The latter has frequently sought the Indian Government's comment and advice on proposals affecting Indians in South Africa."¹⁰⁹ India declared that because of the repressive measures taken against Indians in South Africa a situation had arisen which was likely to impair friendly relations between the two Governments and submitted the question for the consideration of the second part at the first session of the General Assembly under Articles 10 and 14¹¹⁰ of the Charter.¹¹¹ The South African Government contended that the issue was purely domestic in nature, and thus outside the competence of the General Assembly. "Article 2 (7), the domestic jurisdiction clause of the Charter", declared the South African representative, "constituted an over-riding principle qualifying . . . all the provisions of the Charter except enforcement measures, which were not at issue."¹¹²

The General Assembly decided that it was within its competence to deal with the matter and a resolution sponsored by France and Mexico was passed.¹¹³ This resolution declared that the treatment of Indians in South Africa should be in conformity

¹⁰⁹ U. N. Doc. A/149, 1946.

¹¹⁰ Article 10 of the United Nations Charter reads: "The General Assembly may discuss any questions on any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12 may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters; "Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations."

¹¹¹ *Supra* Note 109 at 307.

¹¹² U.N. Gen. Ass. Off. Rec. 1st Sess., Plenary A/929 (1946).

¹¹³ U. N. Gen. Ass. Off. Rec. 1st Sess., Doc. A/44 (1946).

with the international obligations between India and South Africa and the relevant provisions of the Charter. Subsequent to 1946 numerous resolutions have been passed by the General Assembly urging the South African government to abandon its racial policies and its treatment of Indians.¹¹⁴ However, there have been no signs of any willingness on the part of South Africa to rescind any of its policies which discriminate against Indians.

The question of race conflict in South Africa first came before the General Assembly at its seventh session on a joint request, dated September 12, 1952, of 13 members of the Asian-African region.¹¹⁵ They complained that the race conflict in the Republic of South Africa resulting from the policies of apartheid was creating a "dangerous and explosive situation, which constitutes both a threat to international peace and a flagrant violation of the basic principles of human rights and fundamental freedoms enshrined in the Charter of the United Nations."¹¹⁶ They asked for an urgent consideration of the question "in order to prevent an already dangerous situation from deteriorating further and to bring about a settlement. . . ."¹¹⁷ One of the resolutions noted that it was one of the purposes of the United Nations to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms, recalled previous resolutions of the Assembly on the question of racial discrimination and reaffirmed the view it had stated earlier that racial segregation was necessarily based on doctrines of racial discrimination.¹¹⁸

By this resolution, the Assembly also established a commission of three members to study the racial situation in South Africa "in the light of the Purposes and Principles of the Charter, with due regard to the provision of Article 2(7) as well as the provisions of Article 1 (paragraphs 2 and 3), Article 13 (para. 1, b), Article 55 (para. c), and Article 56 of the Charter, and the resolutions of the United Nations on racial persecution and discrimination."¹¹⁹

The United Nations Commission on the Racial Situation in

¹¹⁴ See Rajan, *United Nations and Domestic Jurisdiction*, 382 (1958).

¹¹⁵ See GAOR: First Session, Pl. Mtngs., pp. 1006-61.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Rajan, *op. cit.* supra note 114 at 384.

¹¹⁹ *Ibid.*

the Union of South Africa reported its findings on the racial situation in South Africa in October 1953 to the eighth session of the Assembly. The Commission reported that the South African Government had declined to co-operate in the work of the Commission and therefore its report was mainly based on an analysis of the legislative and administrative measures in force in South Africa, as well as a study of books, documents, statements of witnesses and on information communicated by certain Member states.¹²⁰ The Commission recommended that the Assembly undertake further studies and make recommendations in connection with the implementation of the principles to which Member states had subscribed by signing the Charter.¹²¹ Since 1950, the Assembly has repeatedly called upon South Africa to reconsider its position on race matters and bring its policies into conformity with Charter obligations. The Seventeenth Assembly's resolution condemning apartheid went further than any up to that point.¹²² It requested "Member States to take the following measures, separately or collectively, in conformity with the Charter, to bring about the abandonment of those policies (racial policies): (a) Breaking off diplomatic relations with the Government of the Republic of South Africa or refraining from establishing such relations; (b) Closing their ports to all vessels flying the South African flag; (c) Enacting legislation prohibiting their ships from entering South African ports; (d) Boycotting all South African goods and refraining from exporting goods, including all arms and ammunition to South Africa; (e) Refusing landing and passage facilities to all aircraft belonging to the Government of South Africa and companies registered under the laws of South Africa."¹²³

The first Security Council resolution condemning apartheid was passed in 1960 in the wake of the Sharpeville demonstrations.¹²⁴ Subsequent to that time four additional resolutions have been passed by the Security Council.¹²⁵ The Security Coun-

¹²⁰ See Yearbook of the United Nations (1952-53), p. 54.

¹²¹ *Ibid.*

¹²² Resolution 1597 CXVI of 13 April 1960.

¹²³ *Ibid.*

¹²⁴ U.N. Security Council Off. Rec. 15th year, Supp. April-June, 1960, at 1 (S/4300) (1960).

¹²⁵ U.N. Security Council Off. Rec. 18th year, 1056th meeting (S/5386) (1963); U.N. Security Council Off. Rec. 18th year, 1078th meeting (S/5471) (1963); U.N. Security Council Off. Rec. 19th year, 1128th meeting (S/5761) (1964); U.N. Security Council Off. Rec. 19th year, 1135th meeting (S/5773) (1964).

cil resolution of August 7, 1963 urged Member nations to do the same thing that the General Assembly resolution of 1962 had urged, i.e., stop selling arms, break off diplomatic relations, etc.¹²⁶

Legal Basis for Intervention

In order for the United Nations to intervene in South Africa three provisions of the Charter must first be looked at to determine whether there is a case for intervention. First it must be determined that Article 2 sec. 7 is inapplicable. This section reads:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

The second and third provisions of the Charter that must be satisfied are Chapter V, Article 24 which places the "primary responsibility for the maintenance of peace and security" on the Security Council, and Chapter VII, Article 39 which provides that: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression. . . ."

Because of the interrelationship of these three provisions they will be discussed interchangeably. There are two main arguments which tend to establish that apartheid can no longer be considered within the domestic jurisdiction of South Africa. The first argument is based on the holding of the Permanent Court of International Justice in the case *Nationality Decrees Issued In Tunis and Morocco*.¹²⁷ In 1921, decrees were issued by French, Tunisian, and Moroccan authorities regarding the nationality of certain persons born in Tunis and in Morocco, both French protectorates. Great Britain objected to the application of these decrees to British subjects, and brought the ensuing controversy with France before the Council of the League of Nations. There, France contended that the League lacked jurisdiction, since nationality was a matter which by international law was solely within domestic jurisdiction. The League requested

¹²⁶ U.N. Security Council Off. Rec. 18th year, 1056th meeting 1 (S/5386) (August 7, 1963).

¹²⁷ P.C.I.J., Ser. B, No. 4, 1 Hudson, World Court Reports, 143 (1943).

the Permanent Court of International Justice to give it an advisory opinion. Among other things in its rationale the Court said: ". . . [I]t may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken toward other states. In such a case, jurisdiction which, in principle, belongs solely to the state, is limited by rules of international law."¹²⁸ This case is helpful, not as precedent, but to show a particular interpretation of domestic jurisdiction which can be analogized to South Africa. Assuming *arguendo* that South Africa is correct when it asserts that its treatment of its nationals is within its domestic jurisdiction, under the reasoning of the above case this would still not prevent Article 2, sec. 7 from being inapplicable for the purpose of intervention. When South Africa signed the United Nations treaty it undertook certain obligations to the other signatories. What are these obligations? The ones which are relevant for this discussion are the ones which deal with human rights and fundamental freedoms. Earlier in this paper¹²⁹ five specific provisions of the United Nations Charter delineate the responsibility of members in relation to human rights, and assert the belief of the organization in fundamental freedoms and human rights without distinction to race, sex or language. Since apartheid is diametrically opposed to any type of equality of blacks and whites it is at once obvious that South Africa is abdicating its responsibility as a member of the United Nations. Therefore it would appear that its right to promulgate apartheid is "restricted by obligations which it may have undertaken toward other states," and its jurisdiction over its racial policies "is limited by rules of international law." These rules of international law are the rules which are spelled out in the Charter and in the case of South Africa specifically those rules which prohibit discrimination based on race.

The second argument which takes South Africa's racial policies out of the realm of "domestic jurisdiction" is based on the proposition that apartheid is causing a "threat to international peace and security." African and Asian states have declared that the situation in South Africa has deteriorated to the point where "it is to be hoped that the Security Council will recognize that

¹²⁸ *Id.* at 157.

¹²⁹ See text at footnote 105 *Supra*.

the situation in South Africa is indeed a threat to the peace."¹³⁰ On another occasion it was said that: "Unless the major powers — without whose support no attempt to impose sanctions could be effective — cease their aid to South Africa and make workable proposals for a solution to the problem, they will directly, and much to our regret, have invited the martyred populations of South Africa and all their natural allies . . . to meet force with force, violence with violence, and blood with blood."¹³¹ The Special Committee on Apartheid, which was established by the United Nations General Assembly on November 6, 1962, in its fourth report stated that: "The increasingly repressive policies of the South African government have aggravated racial and political tensions within the country, and these policies have increasingly serious international repercussions, for they have become a constant provocation to peoples beyond the borders of the Republic who feel an affinity with the oppressed people of South Africa."¹³² In a letter dated July 11, 1963 from the Permanent Representative of Poland to the United Nations General Assembly the following was said: "The Polish People's Republic has always considered the South African government's policies of racial discrimination and apartheid as brutal violations of human rights and the most striking manifestation of colonial oppression. Such a policy, based on the creed of master race, by its very nature leads to international friction and, like Nazism, causes a threat to the peace and security of nations."¹³³

In June 1964 the Security Council met to consider the report of the Group of Experts established under its resolution of December 4, 1963.¹³⁴ The Group of Experts reported that the South African government had refused to grant it facilities or to co-operate with it in any form. The Group stated that the most effective first step in eliminating apartheid would be to convene in South Africa a national convention, fully representative of the whole population, to discuss constitutional, economic, social,

¹³⁰ Delegate of Guinea, U.N. Doc. A/SPC/81, 8 Oct. 1963, p. 10.

¹³¹ Delegate of the Philippines, U.N. Doc. A/SPC/86, 31 Oct. 1963, p. 8.

¹³² U.N. Doc. A/5497, 16 Sept. 1963, para. 459.

¹³³ U.N. Doc. A/5439, (1963).

¹³⁴ A New Course in South Africa, United Nations Publication Sales No. 64 I 13. The Security Council also adopted a resolution (S/5761) on June 9, 1964 urging South Africa to renounce the death penalty for opposition to apartheid, and to grant amnesty "particularly to the defendants on the Rivonia trial" of Nelson Mandela and seven others. Two days later, however, the defendants were each sentenced to life imprisonment.

and educational questions in order to set a new course for the future.¹³⁵ The United Nations could offer its good offices, help organize and supervise elections, help maintain law and order during the transitional period, and help educate and train South Africans for the skills which would be necessary in a new South African environment.¹³⁶ The Group believed that economic sanctions could be effective if universally applied against South Africa, and it recommended a "practical and technical study of the 'logistics' of sanctions by experts in the economic and strategic field."¹³⁷ If by a date stipulated by the Security Council, the South African government had not replied to an invitation to discuss the formation of a national convention, the Group recommended that: "the Security Council should then take the decision to apply economic sanction. . . ."¹³⁸ The discussion in the Security Council centered around the question of economic sanctions. The Indonesian delegate cited the conclusions of the International Conference on Economic Sanctions against South Africa, held in London in April 1964, "that total economic sanctions were politically timely, economically feasible and legally appropriate."¹³⁹ When the argument was made that economic sanctions would have more of a detrimental effect on non-whites than on whites the representative of Morocco read a statement of June 11, 1964 by Chief Albert Luthuli appealing "to all Governments throughout the world, to people everywhere, to organizations and institutions in every land and at every level, to act now to impose such sanctions on South Africa that will bring about the vital necessary change and avert what can become the greatest African tragedy of our times."¹⁴⁰

A draft resolution incorporating some of the suggestions of the Group of Experts was introduced by Norway. Its most important provisions were: "establishment of a governmental Committee of Experts to undertake a technical and practical study . . . as to the feasibility, effectiveness, and implications of economic sanctions, and an invitation to the Secretary-General to establish an educational and training program for South Af-

¹³⁵ A New Course in South Africa, op. cit., at para. 31.

¹³⁶ *Id.* at para 8.

¹³⁷ *Id.* at para 110.

¹³⁸ *Id.* at para 121.

¹³⁹ U.N. Doc. S/PV. 1129 (June 1964), pp. 8-10.

¹⁴⁰ U.N. Doc. S/PV. 1130 (June 1964), pp. 8-10.

ricans abroad."¹⁴¹ The resolution was adopted by a vote of 8 to 3.

The above allegations that South Africa's racial policies are threatening international peace and security are all very persuasive authority for this argument. However, one does not have to rely solely on statements made by governments or committees of international organizations. Several events which have taken place in the last two or three years when taken together, provide an even stronger argument that South Africa's policies are threatening international peace and security. The African states and a number of other countries have refused to wait upon a Security Council judgment, and have begun to intervene directly. "The race policies of South Africa arouse more feeling in Africa than any other question. Concern springs from a feeling of kinship with Africans or people of Negro stock anywhere in the world. Africa's concern at the humiliation and hurt suffered by people of colour in the Republic is comparable to the feeling of world Jewry in the days of Hitler's persecution. Unless this parallel is understood, the West will continue to underestimate the determination of Africa to do everything in its power to destroy the present regime in South Africa."¹⁴²

The Organization of African Unity, meeting in Addis Ababa in May 1963, reaffirmed the steps which some African states had already taken toward intervention in South Africa. The Conference established a National Liberation Committee to give financial, moral and *military* support to the liberation movements in South Africa. It also began a process of physically isolating South Africa by banning its aircraft and ships from the air-space and harbors.¹⁴³ In addition to African countries over sixty countries, including the Soviet bloc, the Asian nations, Yugoslavia and a number of Latin American countries, have official policies prohibiting trade with South Africa.¹⁴⁴ All of these countries have long since ceased to quarrel over the theoretical questions of domestic jurisdiction and whether there is an actual threat to international peace and security. They have decided the issues and have proceeded to apply sanctions against South Africa. Thus international intervention is already a powerful ingredient in the South African crisis. The potentially explosive situation which

¹⁴¹ U.N. Security Council Off. Rec. 19th year, 1135th meeting (S/5773) (1964).

¹⁴² Legum, South Africa — Crisis for the West (1964).

¹⁴³ Transcript of Addis Ababa Conference (1963).

¹⁴⁴ Legum, *op. cit.* supra note 142.

could result from this type of unilateral intervention is the essence of the threat to international peace and security.

What is the position of the two major western powers in relation to this situation? Both the United Kingdom and the United States maintain that the calculated application of external coercion would only serve to unite the white minority of the Republic more firmly behind their government. Although the entire world could agree that the policy of apartheid must be ended, "the offer of nothing but hostility and pressure from the outside could hardly assist those inside South Africa who were looking for a better answer",¹⁴⁵ and the aim of the United Nations efforts should be to "create the external conditions most conducive to internal change."¹⁴⁶ Moreover, both powers agreed that the situation in South Africa, although disturbing international peace and security, was not now a threat to the peace. The application of sanctions under Chapter VII of the Charter would therefore be contrary to both the letter and the spirit of the Charter, since that Chapter could apply only after the Security Council had determined the existence of a threat under the terms of Article 39.

It should be clear by now not only that the arguments over domestic jurisdiction have been superseded, but that the effects of apartheid cannot be contained within the Republic. International intervention is already a reality. Unless the West is prepared actively to defend the South African regime — which it is not — there is no way of halting intervention by Africa, supported by over two-thirds of the members of the U.N. Thus it is clear that the only way to prevent what could be one of the most violent and bloody international race wars that the world has ever seen is through United Nations intervention.

United Nations Intervention

Once the Security Council has determined that there is a threat to international peace and security it is empowered to take one of two alternative courses. Article 41 of the Charter provides:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the

¹⁴⁵ Delegate of the United Kingdom, U.N. Doc. A/SPC/SR. 386, (Oct. 1963), p. 12.

¹⁴⁶ Delegate of the United States, U.N. Doc. A/SPC/SR. 392, (Oct. 1963), p. 5.

United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The alternative is Article 42 which states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, *blockade*, and other operations by air, sea, or land forces of Members of the United Nations. (Emphasis added)

The choice of sanctions to be applied should be governed by the effectiveness of the sanction in relationship to the ultimate objective. The ultimate objective should be to produce a situation inside South Africa which will facilitate the transfer of power to a representative form of government under conditions which will ensure a minimum of disruption and provide optimum opportunities for inter-racial co-operation. The short-term objective has already been defined by the Security Council in its 1964 resolution — to induce the South African government to summon a National Convention of the representative leaders of all communities for the purpose of drafting a new constitution acceptable to all, and to provide democratic safeguards. The United Nations should stand ready to offer its assistance in any way possible, but it should not actively participate in the actual negotiations.

Since the prospect of the present South African government consenting to such a National Convention is remote at this time the United Nations must be willing to adopt sanctions capable of inflicting real economic damage on the country as quickly as possible. Since the situation in South Africa has degenerated to a point where one false move could result in violence the United Nations must be careful to concentrate its fight on the economic battlefield.

Two sanctions which have been suggested on a number of occasions are: (1) an embargo on the sale of industrial supplies and components, and a suspension of gold buying; and (2) a world embargo on the sale of oil. Since there is a great profit to be derived from trading with South Africa it seems as if an application of a blockade as provided for by Article 42 of the Charter would be most effective.

The above suggestions have, admittedly, been sketchy as there is a dearth of material on this subject which is somewhat regrettable. If sanctions against South Africa are to be effective there must be an exhaustive and thorough study, made by experts, to determine where South Africa is most vulnerable economically. In connection with this a thorough study must be made of the ways to efficiently and effectively enforce any sanctions which may be forthcoming.

Conclusion

This paper has attempted to shed some light on a situation where daily, men and women are treated as if they were less than human, a situation where men are prevented from developing their capacities to the fullest extent and as a concomitant of that from earning a living which is commensurate with their ability, a situation where women are sometimes forced to live separately from their husbands, a situation where race makes the critical difference between being "free" on the one hand, if one is born white and being subjected to all types of degradations, humiliations and inhuman treatment if one is born black. The situation in this study was South Africa. And yet in other parts of the world many of the same things which are happening in South Africa are occurring daily, even if it is to a lesser extent and in many instances without the sanction of the "written" law. Essentially the core of the problem is perhaps the same. In a sense, all of history has been a story of man's efforts to learn to live with other men — resolving first his individual conflicts with other men in order to form societies for the common good, and then resolving or trying to resolve the conflicts of one society or group of men with another. Always there have been those groups which were the oppressed; always there have been those others who felt their security and way of life threatened by the group struggling for its place in the sun. Where the creative forces needed to resolve the conflict have failed, groups of human beings have turned on others — and have destroyed themselves as well as sometimes their opponents. Where the conflicts have been resolved, society has reached a new level and groups that once feared and hated each other have enriched each other's lives. Sometimes such conflicts smolder uneasily for generations, and then there comes a moment of climax when they boil to the surface and when society must finally summon up the creative capacity to resolve them or face disaster.

Fortunately, there is an organization today with the creative capacity to avert such disasters. This organization, the United Nations, has repeatedly committed itself to the goal of helping men learn to live in peace and harmony and to respect the human worth and dignity of their fellow men. It can only be hoped that ultimately this Organization will be able to achieve its goals universally, and immediately it will be able to prevent bloodshed in South Africa.